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Office of Campaign and Political Finance

One Ashburton Place, Room 411

Boston, MA 02108

Advisory Opinion

April 1, 2005

AO-05-06

Carl Valvo
Cosgrove, Eisenberg and Kiley, PC
One International Place, Suite 1820
Boston, MA 02110-2600

Re: Formation of not-for-profit organization

Dear Mr. Valvo:

This letter is in response to your request for an opinion regarding the implications of the campaign finance law on the prospective activities of a not-for-profit organization.

You have stated that you represent persons who are currently associated with a ballot question committee, the Committee for Health Care for Massachusetts (the Committee). The Committee is organized to promote the adoption of a constitutional amendment that “would create a duty on the part of the Commonwealth to assure that all residents have access to health care coverage.” In accordance with Article 48 of the Massachusetts Constitution, the initiative received the approval of the last Legislature, sitting in joint session, and if similarly approved by the current Legislature, the question will appear on the 2006 statewide ballot for adoption by the voters.

You have also stated that employer groups, health care advocates, insurers, and others are currently preparing numerous other proposals for legislative consideration in the current session. To avoid public confusion as to the provisions and relative advantages and disadvantages of the various proposals, the individuals that you represent are interested in joining with others to form a not-for-profit 501(c)(3) organization, the Massachusetts Health Care Education Fund, Inc. (the Organization), “for educational purposes.”

You have provided two documents concerning the formation of the Organization with your request: (1) an excerpt from the Organization’s Articles of Incorporation to be submitted to the Secretary of the Commonwealth; and (2) a draft 501(c)(3) concept paper for the Internal Revenue Service. Article II of the draft Articles of Incorporation states that the Organization will be formed to engage in the following activities:

- (A) To educate the public on issues pertaining to fundamental health care reform in Massachusetts;
- (B) To promote public participation in the ongoing and anticipated health care reform debates;
- (C) To serve as a clearinghouse for information about the various models for and approaches to expanding affordable access to health care coverage;
- (D) To provide the public with research and analysis so they can make informed decisions about which health care reform proposal(s) best serve their interests; and
- (E) To perform all other activities and duties in furtherance of the above purpose...

The Organization's draft concept paper indicates that "the primary purpose of the 501(c)(3) will be educating and registering voters... The dual focus on education and registration will prepare Massachusetts residents to participate fully in the upcoming public debate on health care reform in Massachusetts and provide them with the tools to make informed decisions among various proposals and to act effectively upon those decisions." The concept paper notes that the Organization will work to prepare voters "to participate in shaping reforms whether they occur by legislative action or by ballot initiative."

You expect that the Organization will conduct its own fundraising to further its stated purposes. Mailings might be distributed to ask persons to make contributions to support a number of planned organizational activities, including, e.g., serving as a clearinghouse for information about various models for expanding health care coverage, lobbying the legislature, and holding debates or informational forums regarding competing proposals. Such mailings might also indicate that the Organization might potentially make expenditures to influence ballot questions relating to the expansion of health insurance coverage. The mailings would not, however, identify specific ballot questions.

It is possible, if not likely, that persons associated with the Committee will be asked to serve on the Organization's board, though not in controlling numbers. It is also possible that the Organization would, if legally permissible, consider making a financial or in-kind contribution to the Committee. If it does so, it will file the requisite Form CPF 22. You have filed this request to ensure that the Organization does not take actions that would require it to form as a political committee.

QUESTION 1: Would the Organization be required to organize as a ballot question committee, or be subject to other restrictions under the campaign finance law, if it undertakes the activities described above?

ANSWER: Yes. If the Organization raises funds even in part for the stated purpose of supporting or opposing a ballot question, it would first be required to organize and register with OCPF as a ballot question committee.

The Organization may, without first becoming a ballot question committee, educate people about alternative approaches to health care reform, as described in the Organization's proposed Articles of Incorporation, or it may lobby the legislature or sponsor debates or hold informational forums, and it may raise funds for those purposes. It may not, however, solicit or receive funds for the purpose of supporting or opposing a health-care related ballot question. Even if the primary purpose of a mailing is related to raising funds for other purposes, if the mailing includes a solicitation stating that the funds received may be used to support or oppose a ballot question, this would implicate Chapter 55 and therefore the Organization should leave this type of fundraising activity to the Committee.

A “ballot question committee” is an association, organization, or other group of persons that raises contributions for the purpose of favoring or opposing a charter change, referendum question, constitutional amendment, or other question submitted to the voters. See M.G.L. c. 55, §§ 1 and 6B and OCPF Interpretive Bulletin IB-88-01.¹

A “contribution” is something of value given to a political committee “for the purpose of influencing the nomination or election” of a candidate or for the purpose of supporting or opposing a political party committee or a question submitted to the voters. See M.G.L. c. 55, § 1 and Weld for Governor v. Director of OCPF, 407 Mass. 761 (1990). In determining whether funds raised are “contributions,” the office considers a number of factors, including the materials used to solicit contributions and the stated purpose of the group raising funds. For example, if an organization’s promotional material asks recipients to contribute so the group can support or oppose a ballot question or otherwise indicates that funds will be used for that purpose, the group would be considered a ballot question committee. Even if funds are solicited for a number of reasons, and only one of the stated reasons is the supporting or opposing of a ballot question, the funds received from the solicitation must be considered “contributions.”

A group is not required to organize and register as a ballot question committee or file campaign finance reports if there is no question on the ballot and the group is not raising funds to influence an anticipated ballot question. On the other hand, funds raised for the purpose of influencing a ballot question, even if the question is not specifically identified, and even if the solicitation occurs prior to the decision to place a question on the ballot, are subject to the campaign finance law. See OCPF Interpretive Bulletin IB-90-02.

You have stated that a ballot question committee has been established to promote the adoption of an initiative relating to universal healthcare and that the Organization wants to avoid undertaking activities that are within the scope of the activities reserved for ballot question committees. Accordingly, the Organization should avoid any fundraising activities related to this proposed ballot question, and leave such activity to the Committee. All funds raised to influence a potential ballot question should be placed in the Committee’s account and be kept separate and distinct from the funds in the Organization’s treasury.

The Organization should also take care to avoid any appearance that it is acting as a pass-through for contributions to the ballot question committee, thereby skirting the campaign finance law. For example, the Organization should not conduct a solicitation drive, and then shortly thereafter contribute most or all of the funds raised to the ballot question committee.

QUESTION 2: What Chapter 55 restrictions, if any, apply to a potential donor to the Organization with respect to earmarking, encouraging or suggesting that the Organization contribute to a ballot question committee?

ANSWER: The Organization, if it is not to be defined as a political committee, may not solicit or receive contributions earmarked for use to influence a ballot question. The campaign finance law states that no person may “directly or indirectly, make a campaign contribution in any name except his

¹ Although M.G.L. c. 55, § 1 defines a “ballot question committee,” to include any group which receives contributions *or makes expenditures* to support or oppose a ballot question, groups that make expenditures but do not solicit or receive funds to support or oppose a ballot question are treated differently from groups that also engage in political fundraising. See M.G.L. c. 55, § 22 (groups that make expenditures, but do not raise funds, to support or oppose a ballot question must disclose the expenditures but are not required to also disclose receipts). See also IB-88-01.

own nor in any manner for the purpose of disguising the true origin of the contribution ...” See M.G.L. c. 55, § 10. A donor may therefore not give the Organization funds earmarked for subsequent transfer to a ballot question committee. If a contributor encourages or suggests that the funds given to the Organization be subsequently transferred by the Organization to a ballot question committee, the Organization must inform the donor that earmarked donations are prohibited and then the funds must either be refunded or deposited in the Organization’s general treasury.

QUESTION 3: What Chapter 55 restrictions, if any, apply to the Organization’s ability to contribute either money or in-kind services to a ballot question committee?

ANSWER: Even if the Organization will not raise funds to influence an anticipated ballot question, the Organization *may* make expenditures for that purpose. The campaign finance law, however, requires disclosure of all expenditures made, in-kind contributions provided, or liabilities incurred by any “corporation, association, organization, or other group of persons” other than ballot question committees, to promote or oppose a ballot question. See M.G.L. c. 55, § 22. Therefore, the Organization must disclose, on Form CPF 22, any contributions to a ballot question committee or expenditures made to support a ballot question.

QUESTION 4: What Chapter 55 restrictions, if any, must the Organization observe in communicating to the public about health care-related proposals to prevent the Organization from becoming subject to the restrictions applicable to ballot question committees?

ANSWER: As discussed in response to your first question, if the Organization’s communications do not indicate that the Organization is raising funds to support or oppose ballot questions, the Organization will not be subject to the reporting and other requirements that apply to ballot question committees. Whether an organization using a communication to raise funds to support or oppose ballot questions is determined by the entire context and words of a communication. A solicitation is subject to the campaign finance law if it would reasonably be interpreted as asking for funds at least in part to be used to support or oppose a ballot question.

The implications of raising funds to support or oppose a ballot question are not present where an organization merely endorses a ballot question. An organization may use its general treasury funds to endorse ballot question proposals, but would need to file a Form CPF 22 disclosing the expenditure. Unless coupled with a solicitation reflecting an intent that funds raised will be used to support or oppose a ballot question, the making of endorsements does not mean that an organization has necessarily become subject to the obligations of ballot question committees.

QUESTION 5: May two persons who are officers of the committee also serve on the board of the Organization?

ANSWER: Yes. Officers of the ballot question committee may also serve as members of the Organization’s board.

This opinion is issued within the context of the Massachusetts campaign finance law and is provided solely on the basis of representations in your letter and your conversations with OCPF staff. Please contact us if you have further questions.

Sincerely,

A handwritten signature in cursive script, reading "Michael J. Sullivan", followed by a vertical line.

Michael J. Sullivan
Director

MJS/gb